90-1023

No.

IN THE

Supreme Court of the United States

1990 Term

WILLIAM KUNTZ, III,

Petitioner,

against

SOCIETY BANK, N.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO AND/OR HONORABLE J. MEAGHER, PRESIDING JUDGE, MONTGOMERY COUNTY COURT OF COMMON PLEAS, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

WILLIAM KUNTZ, III
Pro Se
Box 1722, Broadway Station
Albany, NY 12201-1722
(518) 962-4966

Old Arsenal Hill
Westport, NY

Dated: December 24, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(4526—CVR-172)

Questions Presented

Does the granting of an ex-parte pre-judgment attachment order against petitioner in favor of respondent deny due process?

Does the granting of an ex-parte pre-judgment attachment order against petitioner in favor of respondent, who is a national bank, deny equal protection?

Can the courts of Ohio treat a resident of the State of New York as a non-resident when that citizen of the State of New York has substantial and ongoing contact and commerce within the community in Ohio.

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No.

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1990 TERM

WILLIAM KUNTZ, III,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY, OHIO and/or HONORABLE J. MEAGHER, PRESIDING JUDGE, MONTGOMERY COUNTY COURT OF COMMON PLEAS, MONTGOMERY COUNTY, OHIO.

PETITION FOR A WRIT OF CERTIORARI

Grounds for Jurisdiction

Under the provisions of 28 U.S.C. 1257, an appeal for certiorari to the United States Supreme Court from "final judgments or decrees rendered by the highest court of a state in which a decision could be had . . ." and the constitutional duty to uphold and enforce the various amendments of the Constitution of the United States.

Statement of the Facts

Generally the statement of the facts are set forth in the underlying pleading contained in the appendix of petitioner and respondent.

This action stems from a case entitled *City of Dayton, Ohio vs. William Kuntz, III, et al.*, 88 U.S. 749, cert. denied, involving a portion of the funds awarded to petitioner by the jury of the Montgomery County Common Pleas Court for property commonly known in Dayton, Ohio as the Alladin Cleaners.

Subsequent to this court's denial of the petition for certiorari, counsel for petitioner, then Manley, Burke and Fisher, LPA, of Cincinnati, Ohio, fashioned an order of distribution over the express instructions of petitioner and segmented the fund into three checks.

The first check was delivered to Peter J. Walsh, Esq., as trustee of the One Westminster Co., Inc., property owner. The second check was paid over to First National Bank of Dayton, Ohio, upon an unlitigated lien claim. The third check was delivered to petitioner's counsel in Cincinnati, Ohio.

Subsequent to the delivery of the check to petitioner's counsel, said check was delivered to petitioner in Albany, NY by Federal Express. Petition proceeded to the United States Bankruptcy Court in Wilmington, Delaware, and in an appearance before the Honorable Judge Helen S. Balick, United States Bankruptcy Court, so advised the court that he was in possession of the check and that his view was that these were properly estate funds as they represented co-mingled proceeds from the one-half undivided property interest of Westminster and petitioner (In re 1 Westminster Co., Inc., Debtor, U.S. Bankruptcy Court, District of Delaware [Case No. 83-14]).

Petitioner so advised the court that he was prepared to deliver the check to the trustee upon the issuance of a turnover order.

Petitioner subsequently presented the check to the bank upon which it was drawn in order to obtain its exchange for a cashier's check as the check has a restrictive memorandum on its face impairing the time in which it would be negotiable.

On May 8, 1989, Manley, Burke and Fisher, LPA, made an application to the U.S. Bankruptcy Court for fees in the above captioned matter with regards to legal efforts on behalf of the petitioner and One Westminster Co., Inc. The court, after reviewing the application, granted about $47,000 in fees, disallowing as a credit $20,000 already paid to counsel by petitioner.

On July 5, 1989, Peter J. Walsh, Esq., withdrew as trustee and upon application was paid a sum of about $9,700 for expenses and fees for his services from 1983 through 1989. At that time Mr. Walsh confirmed that he

had in fact paid over to the Manley firm the sum of $47,000. Petitioner was then restored to debtor-in-possession of Westminster.

The petitioner has taken an appeal of the Manley fee award which is now pending in the United States Court of Appeals for the Third Circuit (In re 1 Westminster Co., Inc., Debtor, U.S. Court of Appeals, 3rd Cir. [Case No. 90-3442]).

Subsequent to the fee hearing before the Bankruptcy Court, Manley, Burke and Fisher, L.P.A., made an additional fee application before the Honorable Judge Brown of the Common Pleas Court of Montgomery County, Ohio, for an additional $51,000.

There, the Manley firm represented by affidavit on motion to the Court in late May, 1989, that the check in question remained outstanding and unpaid.

In September, 1989, it was discovered by the Manley firm, the court and the clerk and respondent upon whom the check was drawn that petitioner had negotiated the check months before and verbal demand apparently was made then upon the bank by the Honorable Judge Brown and here, respondent made a credit of $73,000 back to the clerk's account and a check was promptly issued to the Manley firm for an additional sum of $51,000 under a theory of a charging lien pending the outcome of the determination in Philadelphia. Now, on appeal, *City of Dayton, Ohio vs. William Kuntz, III, et al.*, Ohio Supreme Court (Case No. 90-1563).

As set forth in the prior pleading, respondent then obtained an *ex parte* order of prejudgment attachment against property of petitioner without notice and opportunity for hearing.

Petitioner took an appeal which has led to this petition.

Arguments in Support.

Petitioner has set forth below as set forth in his appendix, and as referred to recent Federal cases that it is a clear denial of petitioner's due process and equal protection rights for the bank to have prejudgment attachment without notice and hearing.

Nothing set forth by the bank meets the threshold of the constitutional tests for such state assistance, the sum in question is less than $100,000 and respondents have attached assets with values far in excess of that amount in an effort to extract a settlement from petitioner.

Further, as petitioner has cited, national banks are apparently exempt from prejudgment attachments and accordingly it denies petitioner equal protection under the United States Constitution.

WHEREFORE, petitioner prays the court grant the Writ and allow this case to come forward and clearly settle again the issues which petitioner maintains are supported by an ongoing line of Supreme Court cases.

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APPENDIX A—Decision of Supreme Court of Ohio.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: September 26, 1990

SOCIETY BANK, N.A.,

Appellee,

v.

WILLIAM KUNTZ, III,

Appellant.

Case No. 90-1003

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, and the claimed appeal as of right from said court it is ordered by the Court that said motion is overruled and the appeal is dismissed *sua sponte* for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by William Kuntz.

(Court of Appeals No. CA11899)

THOMAS J. MOYER
Chief Justice

APPENDIX B—Motion to Obtain Leave to Appeal With Memorandum in Support Therefore

IN THE

SUPREME COURT OF THE STATE OF OHIO AT COLUMBUS, OHIO

SOCIETY BANK, NA,
Plaintiff-Appellee,

vs.

WILLIAM KUNTZ, III,
Defendant-Appellant.

APPEAL FROM THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO—2ND DISTRICT

WILLIAM KUNTZ, III
Defendant-Appellant *Pro Se*
Box 1722—Broadway Station
Albany, NY 12201-1722
518-962-4966

June 1, 1990

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TABLE OF CASES AND AUTHORITIES

STATEMENT OF FACTS

On October 5, 1990 plaintiff-appellee commenced an action in the Common Pleas Court of Montgomery County, Ohio Civil Division against defendant. On October 10, 1990 plaintiff-appellee obtained an *ex parte* without Notice Order of Pre-Judgment issued by the Honorable Judge Meagher of the Common Pleas Court. On October 13, 1990 defendant-appellant received the moving papers of the October 10 order and on October 18, 1990 the clerk of the Common Pleas Court mailed to the defendant-appellant a copy of the complaint together with the summons.

That complaint together with the original summons came to defendant-appellant in Albany, NY on October 30, 1990.

At that time defendant-appellant took an Appeal of the Order of Pre-Judgment Attachment to the Court of Appeals of Montgomery County, Ohio. On April 5, 1990 the Court of Appeals dismissed the appeal on the basis that the order of October 10 was not a final appealable order. Defendant filed a Notice of Appeal which was docketed on May 7, 1990 due to the weekend and a copy of which is enclosed herein.

The Order of Pre-Judgment Attachment sought among other assets of the defendant-appellant real estate located in Montgomery County, Ohio.

PROPOSITIONS OF LAW

Proposition of Law 1: That an *ex parte* Order of Pre-Judgment Attachment violates the due process requirements of the Federal Constitution.

Proposition of Law 2: That a Pre-Judgment Attachment by a national bank violates the equal protection clause of the Federal Constitution.

ARGUMENT OF DEFENDANT-APPELLANT WILLIAM KUNTZ, III

It is the contention of defendant-appellant, that the Order of Pre-Judgment Attachment granted without hearing or notice is clearly in violation of the constitutional rights of defendant-appellant. Defendant-appellant submitted in his brief to the Court of Appeals the four leading cases of the Supreme Court of the United States on Pre-Judgment Attachment. Defendant-appellant's brief was filed on or about December 7th, 1990.

In reviewing for this brief, defendant-appellant came across the recent opinion of the United States Court of Appeals for the Second Circuit which was decided on March 9, 1990. *Pinsky, et al. vs. Duncan, et al.*, 898 Federal Reporter, 2nd 852.

While needless to say defendant-appellant cannot match the reasoning in detail of the Honorable Judges Pratt and Mahoney, it is clear that the result there as an analysis is correct. The only clear distinction is that in the *Duncan* case the defendant-appellant brought an additional action in Federal District Court attacking the Connecticut Law as unconstitutional on its face.

Defendant-appellant clearly puts this question now before this court as to whether an *ex parte* Pre-Judgment Attachment is unconstitutional. (Copy of Duncan & defendant-appellant's brief attached)

Further in conducting research for this brief defendant-appellant came across *U.S. vs. F.D.I.C. vs. Taylor dba Exploration Services,* USCA 5th, 881 F.2d 207. In that case under Federal Statute 12 U.S.C. 91 prohibits attachment against a national bank unless and until a final judgment is rendered. (copy attached) It is thus clear that as defendant-appellant would be unable to obtain a Pre-Judgment Order against a national bank. It must follow under the equal protection provisions of the U.S. Constitution that as plaintiff-appellee is a national bank and that the Common Pleas Court of Montgomery County, Ohio granted an Order of Pre-Judgment Attachment in favor of Society Bank, NA, that such an order is a clear violation of equal protection.

Accordingly defendant-appellant would submit that the court take up this matter.

Respectfully submitted,

WILLIAM KUNTZ, III

Appendix C—Memorandum of Plaintiff-Appellee in Opposition to Jurisdiction.

IN THE

OHIO SUPREME COURT

SOCIETY BANK, NATIONAL ASSOCIATION,
Plaintiff-Appellee,

v.

WILLIAM KUNTZ, III,
Defendant-Appellant.

Case No. 90-1003

APPEAL FROM THE COURT OF APPEALS OF
MONTGOMERY COUNTY SECOND APPELLATE DISTRICT

WAYNE H. DAWSON (0010836)
WILLIAM B. FECHER (0039240)
TURNER, GRANZOW & HOLLENKAMP
50 East Third Street
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(513) 228-4184
Attorneys for Plaintiff-Appellee, Society Bank, National Association

WILLIAM KUNTZ, III
Box 1722—Broadway Station
Albany, New York 12201-1722
Defendant-Appellant-*Pro Se*

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I. TABLE OF AUTHORITIES

A. CASES Page

B. CONSTITUTIONS AND STATUTES

II. STATEMENT OF THE CASE

A. *FACTS.* The facts of this case are not at issue; however, they are briefly summarized herein. On February 7, 1989, Judge Brown issued an Entry and Order of Distribution in the case captioned *City of Dayton v. William Kuntz, III,* Case No. 86-2439 on the docket of the Montgomery County Common Pleas Court ("*City of Dayton* case"). In said Entry, Judge Brown ordered the Montgomery County Clerk of Courts to issue a check made jointly payable to "William Kuntz, III and his attorney Robert Manley." The Clerk of Courts complied with the Entry. The check was drawn on Society Bank, National Association, Plaintiff-Appellee, herein.

William Kuntz, III, *pro se* Defendant-Appellant herein, eventually received the Clerk's Check. Without obtaining the endorsement of the co-payee, Robert Manley, William Kuntz negotiated the item in such a manner so as to obtain all the proceeds of the Clerk's Check. Society Bank debited the Clerk's account for the face value of the Check.

Sometime later, a demand was made upon Society Bank to recredit the Clerk's account because the item was not properly payable. Society Bank complied with this demand and later filed suit against William Kuntz to recover damages caused by his actions. The instant appeal involves an Order issued within that case.

B. *PROCEDURAL HISTORY.* The procedural history of this case presents the issue for Appeal. On October 5, 1989, Society Bank filed its Complaint against William Kuntz in the Montgomery County Common Pleas Court. On October 10, 1989, Society Bank filed a Motion for Pre-Judgment Attachment, accompanied by the required supportive materials. Judge Meagher sustained Society Bank's Motion and issued an Order for

Pre-Judgment Attachment ("Attachment Order"). *See* Appendix, pp. 12-16. That same day, Society Bank filed a Praecipe with the Montgomery County Clerk of Courts, instructing that the Clerk issue to William Kuntz copies of the Motion for Pre-Judgment Attachment, Order of Pre-Judgment Attachment and Notice that an Order of Attachment had been issued. The Attachment Order attached:

1. Certain Real Property owned by William Kuntz, III;

2. All money on deposit with Bank One, Dayton, NA standing in the name of or held for William Kuntz, III; and

3. Any interest of William Kuntz, III in the funds held by the Clerk of Courts in the *City of Dayton* case.

William Kuntz took no action concerning the Attachment Order in the Trial Court.

On or about November 11, 1989, William Kuntz filed a Notice of Appeal to the Montgomery County Court of Appeals of the Attachment Order. Appellant's Brief was filed on December 7, 1989. On January 8, 1990, Society Bank filed a Motion to Dismiss Appellant's Appeal, contending that the Order appealed from was not a final, appealable Order, thus denying the Appellate Court jurisdiction to hear the Appeal. Alternatively, Society Bank argued that William Kuntz had not complied with the procedural requirements in filing his Brief.

On April 5, 1990, the Appellate Court sustained Society Bank's Motion, stating "Since the order does not determine the action nor prevents a judgment, the order appealed from is not a final appealable order." Decision and Entry, p. 2. Appended to Appellant's Brief, pp. 5-6. Appellant's Application to Reconsider that Decision was

denied by the Appellate Court, the Court stating "we have reviewed our prior decision and decline to change our ruling that the order which was sought to be appealed is not a final appealable order." Decision and Entry, p. 1. See Appendix, pp. 17-18.

William Kuntz filed his Notice of Appeal to this Court on May 7, 1990.

III. ARGUMENT

A. PROPOSITION OF LAW ONE: AN ORDER OF PREJUDGMENT ATTACHMENT ISSUED PURSUANT TO SECTION 2715.045 OF THE OHIO REVISED CODE IS NOT A FINAL APPEALABLE ORDER.

This Court has recently stated that it "will grant a motion to certify only if there is a substantial constitutional question or if the case is of public or great general interest." *Noble v. Colwell* (1989), 44 Ohio St. 3d 92, 94. However, if the trial court's order of which a review is sought is not a final order, then this Court will not entertain the appeal as it lacks subject-matter jurisdiction to do so. *Id.* This rule applies to the lower appellate courts as well, and the Appellate Court in this case correctly decided that the Order appealed from was not a final order from which an appeal could be taken. That decision should not be disturbed by this Court.

To be a final, appealable order, the order at issue must:

1. affect a substantial right;

2. determine the action; and

3. prevent a judgment.

See, e.g., Stewart v. Midwestern Indemnity Co. (1989), 45 Ohio St. 3d 124, 126. The above criteria are imposed both by the Ohio Constitution, Article IV, Section 3(B)(2), and the enabling statute, Section 2505.02 of the Ohio Revised Code. *See* Appendix, pp. 21-22.

The Order appealed from merely attached certain assets owned by William Kuntz and prevented him "from transferring his assets which could render any judgment obtained by appellee against appellant valueless." Decision and Entry, p. 2. It did not affect a substantial right. The merits of the cause of action were not determined. Finally, it had no outcome determinitive impact on any judgment which may be rendered in the underlying proceeding.

Moreover, the prejudgment attachment statutes enacted by the legislature do provide for an appeal to be taken under the appropriate circumstances. The order for prejudgment attachment was issued pursuant to Section 2715.045 of the Ohio Revised Code, which provides:

> Upon the filing of a motion for attachment, a court may issue an order of attachment without issuing notice to the defendant against whom the motion was filed and without conducting a hearing if the court finds that there is probable cause to support the motion and that the plaintiff that filed the motion for attachment will suffer irreparable injury if the order is delayed until the defendant against whom the motion has been filed has been given the opportunity for a hearing.

O.R.C. Section 2715.045(A) (Pages 1989 Supp.). *See* Appendix, pp. 19-20. The statutes then provide "Before judgment, upon reasonable notice to the plaintiff, the defendant may move to discharge an attachment as to the

whole or any of the property attached. The motion shall promptly be heard and decided by the court." *Id.*, Section 2715.44. *See* Appendix, p. 23. The right of appeal is outlined in Section 2715.46 which provides:

> A party to a suit *affected by an order discharging or refusing to discharge an order of attachment* may appeal on questions of law to reverse, vacate or modify it as in other cases; and the original action shall proceed to trial and judgment as though no appeal had been taken.

Id., Section 2715.46 (emphasis added). *See* Appendix, p. 24. Thus, the prejudgment attachment system enacted by the legislature permits appeal only of an order discharging or refusing to discharge a prejudgment attachment order—not the initial grant or denial of such an order. The order which Appellant wants to be reviewed is merely the initial grant of the attachment.

The system as enacted is consistent with traditional concepts of appellate review. An appellate court should review the propriety of a lower court's decision only after both sides have had an opportunity to affect that initial decision maker. However, the prejudgment attachment statutes, especially Section 2715.045, envision *ex parte* orders. As a result, a trial court may issue an attachment order only after hearing one side's version of the applicable law and facts. However, by requiring the party adversely affected by the attachment order to begin his challenge to the order in the trial court permits that court to make a full record on all issues, which may then be reviewed through the appellate process.

Few Ohio cases discuss the appealability of prejudgment orders of attachment. However, those few cases do so in the context of an order discharging or refusing to discharge the order—not the initial grant or denial of the

order. In *Pilgrim Distributing Corp. v. Galsworthy, Inc.* (1947), 148 Ohio St. 567, this Court stated "It follows that *the decision on the motion to dissolve* the attachment * * * is a final order and as such is appealable." *Id.* at 573-74 (emphasis added). This statement was relied upon by this Court in a later case involving a different type of order. *Roach v. Roach* (1956), 164 Ohio St. 587, 589. *But cf. John H. Spencer, Inc. v. Baker & Hostetler* (1987) 38 Ohio App. 3d 117, 118 (dicta).

The only conclusion which can be reached is that the order appealed from was not a final appealable order and the Appellate Court's decision so holding should not be disturbed by this Court.

B. PROPOSITION OF LAW TWO: THIS APPEAL DOES NOT PRESENT A CONSTITUTIONAL QUESTION NOR IS IT AN APPEAL OF PUBLIC OR GREAT GENERAL INTEREST.

William Kuntz has challenged the Order on constitutional grounds. However, by failing to take any action in the Trial Court to dissolve or modify the Attachment Order as required by statute, William Kuntz has failed to preserve any reversible errors for review by this or any other appellate court. By not enabling the Trial Court to make a decision regarding his constitutional challenges, William Kuntz has only wasted the limited resources of the appellate judicial system.

If William Kuntz had first submitted his challenges to the Trial Court, perhaps the Order would have been dissolved or modified—obviating the need for any appeal. If the Trial Court denied his challenge, then the Appellate Court could have reviewed the Trial Court's logic and reasoning to determine whether the Trial Court erred in the application of the appropriate legal standards. This Court, if it so chose, could have then reviewed the Appel-

late Court's reasoning. By not providing the Trial Court with the initial opportunity, William Kuntz has failed to present to this Court an appeal involving a true constitutional question or an appeal of public or great general interest.

IV. CONCLUSION

Therefore, based upon the foregoing arguments, citations of authority, and references to the record, Society Bank respectfully requests that this Court deny William Kuntz's motion to Certify the Record and dismiss this Appeal.

Respectfully submitted,

WAYNE H. DAWSON (0010836)
WILLIAM B. FECHER (0039240)
TURNER, GRANZOW & HOLLENKAMP
50 East Third Street
Dayton, Ohio 45402
(513) 228-4184
Attorneys for Plaintiff, Society Bank, National Association

V. CERTIFICATE OF SERVICE

I hereby certify that a copy of Society Bank, National Association's Memorandum in Opposition to Jurisdiction was mailed by ordinary U.S. mail, postage prepaid on June 20th, 1990, to William Kuntz, III, Box 1722 Broadway Station, Albany, New York 12201-1722, Defendant-Appellant, *pro se*.

WILLIAM B. FECHER

VI. APPENDIX

Appendix D—Notice of Appeal to the Supreme Court of Ohio

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO—SECOND DISTRICT

SOCIETY BANK, NA,
Plaintiff-Appellee

vs

WILLIAM KUNTZ, III
Defendant-Appellant

Case CA 11899

Now comes defendant-appellant, William Kuntz, III appearing *pro se* of Albany, NY and files this timely Notice of Appeal from the decision and entry of the Court of Appeals for Montgomery County, Ohio rendered on the 5th of April 1990.

That the case involves a substantial constitutional question.

Respectfully submitted

WILLIAM KUNTZ, III *Pro Se*
Defendant-Appellant
Box 1722 Broadway Station
Albany, NY 12201-1722
518-962-4966

Certificate of Service of the Notice of Appeal

I hereby certify that a copy of the foregoing Notice of Appeal was mailed US mail postage prepaid by depositing same in a sealed wrapper within the State of New York addressed to the attorney's for the plaintiff-appellee, being Mssrs Dawson and Fecher at 50 East Third Street, Dayton, Ohio 45402 this 4th day of May, 1990.

WILIAM KUNTZ, III

Appendix E—Decision and Entry of the Court of Appeals of Montgomery County, Ohio, Dated May 25, 1990

IN THE

COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

SOCIETY BANK
Plaintiff-Appellee

v.

WILLIAM KUNTZ III
Defendant-Appellant

Case No. CA 11899

Rendered on the 25th day of May, 1990.

PER CURIAM:

This matter is before the court on the motion of the appellant for reconsideration of our prior decision which dismissed this appeal for lack of a final appealable order. The appellee has filed a memorandum contra to the application for reconsideration. We have reviewed our prior decision and decline to change our ruling that the order which was sought to be appealed is not a final appealable order.

The motion for reconsideration is therefore OVERRULED.

WILLIAM K. WOLFF, JR., Pres.
Judge

JAMES A. BROGAN, Judge

FILED
COURT OF APPEALS

1990 May 25 PM 3:12

PATRICK F. MEYER
Clerk of Courts
Montgomery Co., OH

Copies mailed to:

Wayne H. Dawson
William B. Fecher
50 East Third Street
Dayton, Ohio 45402

William Kuntz III
Box 1722
Broadway Station
Albany, New York 12201-1722

Appendix F—Decision and Entry of the Court of Appeals of Montgomery County, Ohio, Dated Apri 5, 1990

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

SOCIETY BANK, N.A.
Plaintiff-Appellee

vs.

WILLIAM KUNTZ, III, *et al.*
Defendant-Appellant

Case No. CA 11899

Rendered on the 5th day of April, 1990.

Wayne H. Dawson and William B. Fecher, Turner, Granzow & Hollenkamp, 50 East Third Street, Dayton, Ohio 45402

Attorneys for Plaintiff-Appellee

William Kuntz, III, Box 1722, Broadway Station, Albany, New York 12201-1722

Defendant-Appellant, *Pro Se*

* * *

PER CURIAM:

This matter comes before this court upon various motions filed by the parties in this action. Upon careful review of all motions, the court concludes the following:

1. The motion filed by appellant to stay this appeal because of Federated Department Stores filing of bankruptcy is OVERRULED in part. The stay applies *only* to Federated Department Stores, and not to all of the parties in this action.

2. The motion filed by the City of Dayton to dismiss itself from this action is SUSTAINED. As stated in its memorandum, appellant has appealed the decision from Case No. 11922. The City of Dayton was dismissed from that action and therefore this court finds the dismissal of the City of Dayton necessary.

3. The motion filed by appellee to dismiss appellant's appeal is well taken. Appellant appeals from an order of pre-judgment attachment provided for in R.C. §2715.045. This order prevents appellant from transferring his assets which could render any judgment obtained by appellee against appellant valueless. Appellant had the opportunity to move for discharge of the attachment pursuant to R.C. §2715.045(D). Since the order does not determine the action nor prevents a judgment, the order appealed from is not a final appealable order. Therefore, appellee's motion to dismiss appellant's appeal is SUSTAINED.

Therefore, this appeal is hereby DISMISSED.

WILLIAM H. WOLFF, JR.
Presiding Judge

MIKE FAIN, JUDGE

Copies mailed to:

Wayne H. Dawson
William B. Fecher
William Kuntz, III

Appendix G—Brief of Defendant-Appellant William Kuntz, III *pro se*, in the Court of Appeals

IN THE

COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO—SECOND DISTRICT

SOCIETY BANK, NA,
Plaintiff-Appellee,

vs.

WILLIAM KUNTZ, III,
Defendant-Appellant.

Case CA 11899

William Kuntz, III
Defendant-Appellant *pro se*
Box 1722 Broadway Station
Albany, NY 12201-1722
518-962-4966

Dec. 7, 1989

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TABLE OF AUTHORITIES.

UNITED STATES CONSTITUTION:

CASES:

STATEMENT OF THE CASE ON APPEAL

On September 14, 1989 plaintiff-appellee states in its complaint that it made a credit of $73,145.12 to the account of the Clerk of Courts. On Oct. 5, 1989 plaintiff-appellee filed an action in the Common Pleas Court entitled *Society Bank, NA vs. William Kuntz, III,* Case 89-3472. On Oct. 10, 1989 plaintiff-appellee apparently applied for an order of "Pre-Judgement Attachment" against among other property of the defendant-appellant a portion of the funds deposited by plaintiff-appellee with the Clerk of Courts on 9/14/89. On Oct. 13, 1989 a copy of the motion was received by defendant-appellant by regular US mail as set forth in the "Kuntz Affidavit". As further set forth in the Kuntz affidavit, the complaint together with the summons came by certified mail to defendant-appellant on Oct. 30, 1989 having been mailed on or about Oct. 18, 1989 some two weeks after the case was filed and 8 days after the Pre-Judgement Attachment was applied for by the plaintiff-appellee.

As of the date of the Kuntz affidavit and as of the date of this brief, no copy of the Pre-Judgment Order has been served upon defendant-appellant. From that order this appeal flows.

ARGUMENT OF THE CASE UPON APPEAL

The Ohio Rules of Civil Procedure provide that under Rule 51.8

> "Except as otherwise provided in these rules, every order required by its terms to be served . . . shall be served upon each of the parties . . . upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address . . ."

Accordingly it would seem that the action of Pre-Judgement Attachment is defective as no order has been served upon defendant-appellant.

Defendant-appellant notes that the rule provides that "every order by its terms to be served" should be the catch phrase if the order did not provide that the defendant-appellant were to be served with said order of the Pre-Judgement Attachment.

In researching for this brief, defendant-appellant has found four cases of the Supreme Court of the United States on Pre-Judgement Attachment. *Sniadach vs. Family Finance Corp. of Bay View, et al.,* 395 U.S. 340, 1969; *Fuentes vs. Shevin, Attorney General of Florida, et al.,* 407 U.S. 67, 1972 and *Mitchell vs. W.T. Grant Company,* 94 S.Ct. 1985, 1974; *North Georgia Finishing, Inc. vs. Di-Chem. Inc.,* 95 S.Ct. 719, 1975. In each case the thinking on the Pre-Judgement Attachment flows and follows the 14th amendment of the United States Constitution as well as the fifth.

The traditional view and basis for Pre-Judgement Attachment flows from the concern that the plaintiff-appellee, if the complaint is found to be with merit will be able to satisfy his judgement.

> "Similarly plaintiff will accomplish little by obtaining a judgement against the defendant, if during the action defendant has disposed of all his assets thereby rendering himself judgement proof" Art 60 *Provisional, Remedies General NY Civil Practice Law,* McKinney's New York Consolidated Law Reporter (6001.3)

> "For centuries an order of attachment was granted *ex-parte,* on the theory that if the plaintiff told the defendant that he was about to seize the latter's property, the defendant would abscond with the

> property" *attachment* Art 62 NY Civil Practice Law McKinney's New York Consolidated Law Reporter (6211.1)

In this case, those facts requiring urgent *ex-parte* action do not in fact exist. The injury that plaintiff's complain of happened in February, 1989. The providing of a credit to the Clerk of Court's happened in Sept. Defendant-appellant did not even learn of the Sept. 14, 1989 payment until Oct. 13, 1989 when he received a copy of the motion for "Pre-Judgement Attachment" which was apparently granted on Oct. 10, 1989 *ex-parte,* without notice.

How defendant-appellant could remove and conceal the bulk of the funds attached by the Pre-Judgement Attachment when he was not even aware that these funds were "his" is beyond the comprehension of defendant-appellant. It is quite apparent that some goings-on behind the scene proceeded the plaintiff-appellee's action.

As to the real estate attached, IE 4100 Tam-O-Shanter Day, defendant-appellant has owned the property for a number of years and from time to time offered the property for sale. Most recently at a price of $160,160.10.

The mere filing of the lawsuit on Oct. 5, 1989 would provide notice of pendency to any prospective buyer who would examine the title and court records before paying such a sum. In short a *lis pendens* or caution as to the subject property would protect the banks recovery. Accordingly plaintiff-appellee could not reasonably show that condition did in fact exist.

> "There may be cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods" *Fuentes vs. Shevin, ibid.* pg. 93.

Nor could plaintiff-appellee show such harm in that $73,000.00 would risk a financial institution with billions of dollars in assets.

> "Thus, the court has allowed summary seizure of property . . . to protect against the economic disaster of a bank failure" *Fuentes vs. Shevin, ibid.* pg. 92.

Further there is no pressing government interest in such an *ex-parte* proceeding.

> "Pre-judgement replevin statutes serve no such important government or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake" *Fuentes v. Shevin, ibid.* pg. .

Nor can the proposition that the plaintiff-appellee has been defrauded form a basis for Pre-Judgement Attachment.

> "The questions of fraud . . . are equally 'ill-suited' for preliminary *ex-parte* determination particularly where, as here, the critical allegations of fraud, however detailed, are based upon information and belief" (6201.4) NY Civil Practice Law McKinney's New York Consolidated Law Reporter citing *Sugar vs. Curtis Circulation Co.*, DCNY.

Plaintiff-appellee concedes that it was not defrauded if that be the case until it made a willing credit to the account of the Clerk of Courts in September, 1989.

Up to that point in time it had suffered no injury, by any stretch of its pleadings.

Noting that property rights are no less sacred than personal rights, the court held that "the constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions" (6261 *ibid.*)

Justice Harlan in his concluding opinion in *Sniadach vs. Family Finance, id.* pg 343:

> "Due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity or at least the probable validity, or the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use."

or as stated in *Mitchell vs. W. T. Grant Company, ibid.*:

> "The question before the court in Fuentes was what procedures are required by the due process clause of the fourteenth amendment when a state, at the behest of a private claimant, seizes goods in the possession of another, pending judicial resolution of the claimant's assertion of superior right to possess the property. The court's analysis of this question began with the proposition that, except in exceptional circumstances, the deprivation of a property interest encompassed with the Fourteenth Amendment's protection must be preceded by notice to the affected party and an opportunity to be heard" p 1933.

Nothing like this action happened before plaintiff-appellee sought the Pre-Judgement Attachment. The record is clear that the summon's with the complaint was not mailed for at least a week afterwards.

Further, alleged fraud as claimed by the plaintiff-appellee can not be the basis for an *ex-parte* proceeding.

> "With the exception of actions based on sister state judgements, the nature of the action—e.g. fraud. Conversion is no longer a ground for attachment. Rather, attachment is available only when it is necessary for jurisdiction or when the defendant is disposing of his property with the intent to defraud creditors . . . . if the *ex-parte* procedure is employed, there must be an immediate hearing, brought on the plaintiff who has the burden of showing the ground for attachment, the need for it and the probability that he will succeed in the action. The plaintiff is now made absolutely liable for all damages occasioned by an improper or wrongful attachment and the undertaking is no longer the ceiling of his liability (6201.1 NY Civil Practice Law McKinney New York Consolidated Law Reporter).

ATTACHMENT

As the plaintiff-appellee has just filed his action and does not have a "sister-state" judgement, attachment could not be granted in New York *ex-parte*.

Article IV Section 1 of the United States Constitution provides that:

> "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Section 2 provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Plaintiff-appellee was granted *ex-parte* order of attachment without bond. New York provides that:

> "Because of the obvious dangers to the defendant from the abuse of a provisional remedy, the plaintiff is generally required to put up an undertaking to indemnify the defendant against loss. CPLR 6212B, 6312B, 6403
>
> '. . . liability on the undertaking is absolute where the provisional remedy is vacated on the ground that the plaintiff was not entitled to it or where the defendants is successful in the action' (6001.5 *ibid.*)
>
> There is also the possibility of tort liability for malicious prosecution. Where the plaintiff—formerly defendant—can prove that the defendant—formerly plaintiff—obtained the provisional remedy maliciously and without probable cause." (6001.5 *ibid.*)

It would therefore appear that plaintiff-appellee was able to obtain *ex-parte* Pre-Judgement Attachment against defendant-appellant from Ohio without bond when such action would not be permitted in New York. Accordingly such a proceeding clearly violates the constitutional protections to equal protection under law.

New York Law provides:

> "An order of attachment granted without notice shall provide that with a period not to exceed five

> days after levy the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment. If the plaintiff fails to make such a motion within the required period, the order of attachment and any levy thereunder shall have no further effect . . ." (6210B *ibid.*)

Not only has defendant-appellant not had any such hearing, not even the order which effected the attachment has been served upon him, the barest of de minimis of due-process.

> "In the last ten years, the United States Supreme Court has taken a dim view of provisional remedies, particularly when they are granted without notice to the defendant" (6001.3 *ibid.*)

Plaintiff-appellant sets forth that it will prevail in the action.

> "Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation, because of the understandable, self-interested fallibility of litigants.
>
> A court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has examined the support of the plaintiff's position" *Fuentes v. Shevin, ibid.* pg 33.

The basis for all of this is the position of the plaintiff-appellee that defendant-appellant is a resident of the State of New York.

Under Ohio case law both propositions that such non-resident status can allow *ex-parte* proceedings without bond must fail.

> 'A left Ohio with his family for New York with the intention of returning if he could compromise with his creditors, or to remain if he could get employment there. Neither of these contingencies happened. Held that he was not a nonresident, within the meaning of the foreign attachment law' —*Smith v. Dalton,* 13 Dec Repr 469, b Cin Super Ct R 150.
>
> 'A person who has moved to another state and is residing there, but who still considers this state as his home and domicile to which he will ultimately return, is not a "nonresident" within the meaning of the attachment laws—' *Egan v. Lumsden P. McGovern,* 13 Dec Repr 103, 3 Dec Repr 2 Disn 163, 4 Week Law Gaz 161 Wests CJS 25 *nonresidence.*

Accordingly the non-residence basis extended by plaintiff-appellee is not supported by Ohio Case Law.

CONCLUSION AND RELIEF SOUGHT

The Pre-Judgement Attachment obtained by the plaintiff-appellee does not even come close to the mandated standards for such actions.

Even the order for attachment obtained *ex-parte* without notice has not been served upon defendant-appellant. Such a lack of due process cannot stand the review of the Court of Appeals. We are all well aware of the power that

banks enjoy. Both in obtaining information and the financial resources with which to press the commercial ventures they undertake, such as the arcade square. As the court may note, Society Bank, NA is not a disinterested party to these overall proceedings both that Society Bank, NA vs. Kuntz matter now before the court or other matters. A decision was made and a course of action was set upon with regards to a transaction which happened months ago. Nothing contained in the complaint can justify *ex-parte*—proceedings and as this court is aware defendant-appellant is not without sufficient interests in the community for the court to sanction such abuses.

Accordingly defendant-appellant would respectfully request that the court grant an order vacating the unserved order of Pre-Judgement Attachment and sanction the plaintiff-appellee $50 for the filing cost of this appeal, plus a reasonable allowance for postage and copy charges in serving the brief.

Respectfully submitted,

WILLIAM KUNTZ, III
Pro Se Defendant-Appellant
Box 1722, Broadway Station
Albany, NY 12201-1722
518-962-4966

CERTIFICATE OF SERVICE OF APPELLANTS BRIEF

I hereby certify that a copy of the foregoing brief was mailed US postage prepaid by depositing same in a sealed wrapper addressed to Mssrs Dawson and Fecher, Attorney's for the plaintiff-appellee Society Bank, NA, at 50 East Third Street, Dayton, Ohio 45402. This the of December, 1989.

APPENDIX H—Order for Pre-Judgment Attachment

IN THE

COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

SOCIETY BANK, NATIONAL ASSOCIATION,
Plaintiff,

v.

WILLIAM KUNTZ, III,
Defendant.

Case No. 89-3472
(Judge Meagher)

This cause came to be heard upon Plaintiff, Society Bank, National Association's ("Society Bank") Motion for Pre-Judgment Attachment ("Motion") filed in the above-captioned case.

Society Bank's Motion requests relief pursuant to Section 2715.045, which allows a Court to issue an order of attachment prior to judgment without notice and hearing only if certain conditions are met. Based upon the Motion, the attachments thereto, and the pleadings filed herein, this Court finds as follows:

1. Society Bank filed its Complaint in this case on October 5, 1989.

2. The Complaint is a civil action for the recovery of money.

3. The Defendant, William Kuntz, III, is not a resident of this State.

4. The obligation sued upon by Society Bank was fraudulently incurred.

5. Society Bank's claim arises upon the violation of judgments or decrees of the Common Pleas Court of Montgomery County, Ohio.

6. The Affidavit of William B. Fecher describes the property to be attached, states its approximate value, the location and use of the property, the name of any third person in actual possession of the property and that the property is not exempt from attachment or execution.

7. Probable cause exists to support Society Bank's Motion in that it is likely that Society Bank will obtain a judgment against William Kuntz, III.

8. Society Bank will suffer irreparable injury if the order of attachment is delayed in that William Kuntz, III may dispose of, conceal, or otherwise place the property to be attached beyond the jurisdiction of this Court.

9. Any bond of Society Bank which may be required pursuant to Ohio Revised Code Section 2715.044 is not required in this case as William Kuntz, III is not a resident of this State.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT

FIRST, Society Bank's motion for pre-judgment attachment is well taken and sustained in all respects.

SECOND, the Sheriff of Montgomery County, Ohio is required to levy upon and attach the property set forth in Exhibit 1, attached hereto.

IT IS SO ORDERED.

Judge Meagher

Copies to:

Wayne H. Dawson, William B. Fecher, Turner, Granzow & Hollenkamp, 50 East Third Street, Dayton, Ohio, Attorneys for Plaintiff, Society Bank, National Association

William Kuntz, III, Box 1722 - Broadway Station, Albany, New York 12201-1722.

Bailiff

EXHIBIT 1—PROPERTY TO BE ATTACHED

The real property located at 4100 Tam-O-Shanter Way, Dayton, Ohio 45429, more particularly described on Exhibit 1 attached hereto, to which William Kuntz, III claims ownership by deed recorded on July 30, 1985, Deed Microfiche No. 85-0380 D01 in the Montgomery County Recorder's Office (the "Real Property").

All money presently on deposit with Bank One, Dayton, NA standing in the name of or held for William Kuntz, III (the "Bank One Account").

Any interest of William Kuntz, III in the funds held by the Montgomery County Common Pleas Court by the Decision and Entry Amending the Order of Distribution issued in the Case captioned *The City of Dayton v. William Kuntz, III, et al.*, Case No. 86-2439 on the docket of

the Montgomery County Common Pleas Court, a copy of which is attached to the Complaint as Exhibit 4 (the "Clerk of the Courts Funds").

Legal Description of the Real Property
Known As 4100 Tam-O-Shanter Way

Situated in the City of Kettering, County of Montgomery and State of Ohio being a part of Section 4, Township 1, Range 6, M.R.S., bounded and described as follows:

Beginning at an iron pipe marking the southeast corner of lands of subject owner, in the north line of lands of John R. and Sally S. Korte (76-273E10), being the southwest corner of lands of Jack A. and Elizabeth Russell (D.B. 2200, page 544), said point being referenced; N. 15°22'10"E., 348.67 feet to a point on the north line of said Section 4; thence, N. 76°54'24"W., 2577.80 feet to the northwest corner of said Section 4; thence, from said beginning point, leaving lands of said Russell and running in part with lands of said Korte and in part with lands of Keith H. Krammes (77-470B12),

N. 75°39'39"W., 160.26 ft. (passing an iron pin at the corner of said Korte and said Krammes at 7.83 feet), (passing another iron pin at the northwest corner of lands of said Krammes at 110.26 feet), to an iron pin in the center of the cul-de-sac of Tam-O-Shanter Way marking the southwest corner of lands of subject owner; thence, in part with said Tam-O-Shanter Way and in part with lands of Hershel R. Lamme (D.B. 1668, page 491),

N. 04°01'28"E., 123.07 ft., to an iron pin; thence leaving lands of said Lamme and running along the north line on lands of subject owner,

S. 86°20'33"E., 188.37 ft., to an iron pin in the west line of lands of said Russell marking the northeast corner

of lands of subject owner; thence, along the west line of said Russell,

S. 15°22'10"W., 156.02 ft., to the place of beginning, containing 0.5531 acres, more or less, subject to all legal highways and easements of record.

Appendix I—Decision of the Supreme Court of Ohio in City of Dayton v. William Kuntz, III, Dated December 5, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 5, 1990

City of Dayton, Ohio, *et al.*,

Appellees,

v.

William Kuntz, III, *et al.*,

Appellants.

Case No. 90-1563

Entry

Upon consideration of the motion for an order directing the Court of Appeals for Montgomery County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by William Kuntz.

(Court of Appeals Nos. CA11870 & CA11922)

THOMAS J. MOYER
Chief Justice

Appendix J—Decision of the Supreme Court of Ohio in City of Dayton v. William Kuntz, III, Dated December 5, 1990.

THE SUPREME COURT OF OHIO

1990 TERM

To wit: December 5, 1990

City of Dayton, Ohio, *et al.*,

Appellees,

v.

William Kuntz, III, *et al.*,

Appellants.

Case No. 90-1563

Entry

This cause is pending before the Court on the filing of a motion for an order directing the Court of Appeals for Montgomery County to certify its record. Upon consideration of appellant's motion to require proper service or alternatively, to strike memorandum opposing jurisdiction,

IT IS ORDERED by the Court that said motion to require service be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice